IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-987

ROSS BAKER, doing business as ROSS BAKER TOWING,

Petitioner,

vs.

JAMES D. HODGSON, SECRETARY OF LABOR UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF
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Petitioner Ross Baker, doing business as Ross Baker Towing, does respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, filed in this matter on

October 26, 1976, a Petition for Rehearing having been denied by said court on December 9, 1976.

OPINIONS BELOW

The Opinion of the Court of Appeals, not yet reported, along with the Order Denying the Petition for Rehearing, is set forth in Appendix "A".

The "Memorandum of Decision" and the Judgment of the United States District Court, the trial court, is set out in Appendix "B".

JURISDICTION

Jurisdiction of this court is invoked seeking review of the decision of the Court of Appeals for the Ninth Circuit pursuant to the provisions of 28 U.S.C. §1254(1).

As mentioned above, the decision of the Court of Appeals was filed October 26, 1976, a timely filed Petition for Rehearing was denied on December 9, 1976 and this Petition for a Writ of Certiorari is filed within 90 days from the date of the denial of the Petition for Rehearing.

QUESTIONS PRESENTED

1. Are strictly local activities of employees, entirely within a single state, "in commerce" so as to be covered by the Fair Labor Standards Act, which defines "commerce" as "trade, commerce, transportation, transmission or communication among the several states or between any state and any place outside thereof?"

2. Where the Congress in enacting the Fair Labor Standards Act, rejected language that it apply "to employers' engaged in commerce in any industry affecting commerce" for the present language of the Act that it apply only to employees engaged in commerce, can coverage under the Act be predicated on activities - not of employees - but of employers in an industry (asserted as) affecting commerce?

3. Is a wage plan contract of employer to pay employees a guaranteed regular rate (above the minimum wage rate) for the first 40 hours each week, time and a half that rate for hours in excess of 40, plus commissions (if any are earned) if they exceed the total compensations due (for both time and time and a half) for the hours worked, violative of the overtime provisions of the Fair Labor Standards Act (assuming coverage of the Act.)"

STATUTORY PROVISIONS INVOLVED

A. Section 3(b) of the Fair Labor Standards Act, 29 U.S.C. 203(b):

> "§ 203. Definitions
> As used in this chapter -
> * * * * *
> (b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

B. Section 7(a)(1) of the Fair Labor Standards Act, 29 U.S.C. 207(a)(1):

> "§ 207. Maximum hours
> (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce * * * * * for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

C. Section 7(e)(5) of the Fair Labor Standards Act, 29 U.S.C. 207(e)(5):

"(e) As used in this section the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf, of the employee, but shall not be deemed to include -

* * * * *

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be."

D. Section 7(h) of the Fair Labor Standards Act, 29 U.S.C. 207(h):

"(h) Extra compensation paid as described in paragraphs (5) - (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section."

STATEMENT OF THE CASE

A. RELEVANT FACTS

Petitioner, a sole proprietor, operated, in the limited area of the north and northwest sections of the San Fernando Valley within the City of Los Angeles, California, an emergency automotive roadside service garage, providing disabled motorists of the general public, on-the-scene service such as starting stalled cars, fixing flats and changing tires, providing battery jumping, gasoline, pushing stuck or drowned out cars, and towing where required. He employed from nine to twelve tow truck drivers and operated in competition with 30 or 40 similar business in the area (C.T. p. 161, line 27 through line 3, p. 162; R.T. p. 46, line 4 through line 15, page 47; Plaintiff's Exhibit 1).

Neither petitioner nor any of his employees did any business nor had any transactions or activities outside of the State of California (R.T. p. 45, lines 17-22).

In the area within the City of Los Angeles serviced by petitioner, there was a 2-1/2 to 3 mile section of the San Diego freeway from the interchange of the Golden State Freeway to the Nordhoff exit, and on occasions petitioner's drivers have rendered automotive roadside service on a local road sometimes designated

as the Simi Valley Freeway (C.T. p. 162, lines 4-9).

During the period involved in this suit petitioner had written contracts with his service employees to pay them $1.65 per hour for the first 40 hours each week, time and a half that ($2.48 per hour) for hours above 40 hours per week and for standby work at nite (when they worked) whether this was over 40 hours or not, and $5.00 for each police originating call, 87¢ for each daytime and $1.40 for each nite-time auto club call and 43% of gross business received from commercial calls, with the sums paid for police, auto club and percentage of business received on commercial calls credited against the guaranteed regular rate and overtime rate for regular and overtime worked, and any excess above this paid to the employees in addition to their regular and overtime compensation (C.T. p. 163, lines 3-32, p. 164, lines 1-5; R.T. p. 50, line 23 to line 11, p. 5; Deposition of Baker, p. 17, line 14 to line 5, p. 18; viz C.T. p. 57).

Some of the employees had no freeway calls, and others, for example, in 42 weeks of employment had a total of 7 such calls in the course of 5 different weeks, in 60 weeks of employment had 8 such calls in 5 separate weeks, and in 37 weeks of employment had 3 such calls (C.T. pp. 170-172).

No evidence was presented that showed any of such employees ever serviced any vehicle other than one that was local in origin and destination.

B. PROCEEDINGS HAD

The U.S. Department of Labor brought this action under Section 17 of the Fair Labor Standards Act (29 U.S.C. 217) to restrain the withholding of payment of claimed overtime compensation due petitioner's employees. (Note: Under Section 16(c) of the Act (29 U.S.C. 216(c)) it is declared that no court shall have jurisdiction over an action by the Secretary of Labor to recover claimed unpaid overtime compensation if the suit involves any issue of law not finally settled by the courts. It is submitted that the issues of law in this suit have not been finally settled by this Court!) (C.T. pp. 1-3.)

Petitioner denied that there was any unpaid overtime compensation due any employee and asserted that none of his employees were engaged in commerce among the several states as defined by the Act and thus were not covered by the Act; and notwithstanding this, that he met all of the overtime specifications provided in Section 7 of the Act (C.T. pp. 4-9).

The case was tried without a jury. The Court issued a memorandum decision finding that the employees were engaged in commerce (being bound by a decision of the Ninth Circuit in Gray v. Swanney-McDonald, 436 F.2d 652 (1971) which decision is commented upon herein) but that petitioner had violated neither the overtime provision nor record keeping provisions of the Act and rendered judgment that plaintiff

take nothing and that the action be dismissed on the merits (C.T. p. 177 and 188).

The Secretary of Labor appealed the judgment of dismissal to the Court of Appeal, Ninth Circuit and petitioner cross-appealed on the issue (among others) that the employees were not engaged in "commerce" as defined by the Act and thus were not covered by it (C.T. 197, 202 and 203).

The Court of Appeal rendered a decision sustaining the trial court that the employees were engaged in commerce (relying on Swanney v. McDonald, Inc., 436 F.2d 652 (9th Cir.) but reversed the court as to its determination that there was no violation of the overtime provision in the petitioner's pay plan. (See Appendix A.)

Petitioner sought to point out to the Court of Appeal in a Petition for Rehearing that its decision as to the overtime provisions being violated was predicated upon a misunderstanding of the basis of payment of the employees and thus that the conclusions reached by the court as to such payment was inaccurate, calling attention to the exact pay records in the transcript showing payment of regular time, overtime plus additional sums where commissions exceeded total compensation earned.

The Petition for Rehearing was denied. (See Appendix A.)

This petition followed.

REASONS FOR GRANTING THE WRIT - ARGUMENT

1. THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS, IN ESSENCE (FOR THOSE UNDER ITS JURISDICTION) CHANGED THE PROVISIONS OF THE FAIR LABOR STANDARDS ACT BY APPLYING CRITERIA REJECTED BY CONGRESS (AND CONTRARY TO DECISIONS OF THIS COURT) AND HAS HELD (AS IT HELD - BUT REVERSED BY THIS COURT - RE THE ROBINSON-PATMAN AND CLAYTON ACTS, WHICH HAVE SUBSTANTIALLY IDENTICAL DEFINITION OF COMMERCE AS FAIR LABOR STANDARDS ACT) THAT ACTIVITIES WHICH MERELY "AFFECT" COMMERCE ARE IN COMMERCE.

The banner and controlling case in the Ninth Circuit regarding strictly local intrastate small automotive emergency roadside service garages being classed as being "in commerce" under the Fair Labor Standards Act, is Gray v.

Swanney-McDonald, Inc., 436 F.2d 652 (1971) (Cert. denied 402 U.S. 995).

The U.S. District trial courts assert that they are bound by it, and the Court of Appeals for the Ninth Circuit summarily dispose of succeeding cases challenging coverage under the Act (as being local intrastate and not in commerce as defined by the Act) by citing this case. Such was done here (as was done in an intervening case of a strictly local small garage, of Brennan v. Keyser, 507 F.2d 472 (9th 1974) (Cert. denied 420 U.S. 1004 (1975)).

In fact, in briefs filed by the Secretary of Labor, where challenge of coverage is made by reason of the fact that the garage is a small local garage doing business solely within a single town or community (and no interstate) it is stated that the "coverage question" "has been settled beyond argument" by the controlling decision in Gray v. Swanney-McDonald, Inc.

The decision in Gray v. Swanney-McDonald, Inc., and the subsequent decisions of the Ninth Circuit, including the decision in this case, predicated thereon as to intrastate activities being "in commerce" under the Act, is and are contrary both to the mandate of the Congress and the interpretation of the Act by the Supreme Court.

A. Mandate of Congress Under the Act.

The Fair Labor Standards Act as it was originally passed by the House of Representatives, applied (as the Ninth Circuit Court of Appeals now applies it) to Employers "Engaged In Commerce In Any Industry Affecting Commerce." (Underscoring added.)

See H. Rep. No. 2182, 75th Congress, 3rd Sess. page 2; 83 Cong. Rec. 7749-50.

Note comment in Kirschbaum v. Walling, 316 U.S. 517 pp. 522, 523, 62 S.Ct. 1116, pp. 1119-20 (1942) (a "production of goods for commerce" case.).

However, the bill recommended by the conference and which passed and which is the law on the books today, applied only to Employees (Not Employers) "Engaged in Commerce" (or in the production of goods for commerce) (not here applicable)) and not to "Any Industry Affecting Commerce."

What did the Congress mean by "engaged in commerce?" It defined it thus:

> "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

Sec. 3(b) Fair Labor Standards Act, 29 U.S.C. 203(b).

Congress mandated that the Act apply (as to the situation here involved) only to activities of the Employees (Not Employers) actually engaged in "trade, commerce or transportation.... among the several States," Not Local Intrastate activities.

Coverage of activities which "Affect" commerce was rejected by the Congress.

Congress also rejected coverage on an industry wide basis (which is the criteria utilized by the Ninth Circuit Court of Appeals) as being in commerce, but rather mandated that coverage as to the employee depended upon the activities of the individual employee -- regardless of the employer's business - and for such activities to be in commerce they must be trade, commerce, transportation, transmission of communication Among The Several States.

B. Interpretation by Supreme Court

Coverage under the Act is "dependent upon the character of the employees' work," not the industry or activities of the employer!

Walling v. Jacksonville Paper Co., 317 U.S. 564, p. 571, 63 S.Ct. 332, 337 (1943) (where some of the activities of some of the

employees in an industry which was engaged in commerce, were determined not to be covered by the Act).

If the activities of the "employees" merely "affects" commerce, the employees are not covered by the Act because it does not extend to businesses or transactions "affecting" commerce.

Walling v. Jacksonville Paper Co., supra;

> ".... Congress is enacting this statute statute plainly indicated its purpose to leave local business to the protection of the states." (Underscoring added.)

Walling v. Jacksonville, 317 U.S. 564, p. 570, 63 S.Ct. 332, p. 336.

> "Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. The proposal to have the bill apply to employees 'engaged in commerce in any industry affecting commerce' was rejected in favor of the language now in the act..."

McLeod v. Threlkeld, 319 U.S. 491, p. 493, 63 S.Ct. 1248, 1249 (1943).

> "... the Act also manifests the competing concern of Congress

to avoid undue displacement of state regulation of activities of a dominantly local character. Accommodation of these interests was sought by the device of confinement of coverage to employment in activities of traditionally national concern. The focus of coverage became 'commerce' not in the broadest constitutional sense, but in the limited sense of §3(b) of the statute: 'trade, commerce, transportation, transmission or communication among the several States...'"

Mitchell v. H. B. Zachry Company, 362 U.S. 310, p. 316, 80 S.Ct. 739, 743 (1960).

(i) Recent Cases on Statutes With Similar Definition of "Commerce".

In the recent case of Gulf Oil Corporation, et al. v. Copp Paving, Inc., et al. (Dec. 1974) 419 U.S. 186, 95 S.Ct. 392 (which is subsequent to the Gray v. Swanney-McDonald case) this court reversed the Ninth Circuit which had held that manufacturers of hot asphalt sold entirely intrastate for surfacing of highways, were "in commerce" under the Clayton Act which has a similar definition of commerce as that contained in the Fair Labor Standards Act.

(Note: The position of the Ninth Circuit in the Gulf Oil case that highways are instrumentalities of interstate commerce, therefore any conduct with respect to an ingredient of a highway is per se "in commerce" - which is the same theory used by it here under the Fair Labor Standards Act, that because a local garage services a local motorist on a highway in his community, the garage and its employees are "in commerce" - was rejected by this court.)

The definition of "commerce" in the Clayton Act, involved in the Gulf Oil decision is:

> "trade or commerce among the several states and with foreign nations." 15 U.S.C. 12

The other recent case of this court (which also is subsequent to the controlling Swanney-McDonald case in the Ninth Circuit) dealing with an "in commerce" definition similar to that in the Fair Labor Standards Act is:

U. S. v. American Building Maintenance Industries, ___ U.S. ___, 95 S.Ct. 2150 (June 1975) which involved the definition of commerce found in Section 1 of the Clayton Act, quoted above.

There the court pointed out that the "in commerce" provisions of such Act, cannot be satisfied by merely showing activities which "affect" commerce.

C. Effect of the "In Commerce" Decisions of the Ninth Circuit.

As pointed out, the Court of Appeals in this case and in others since the decision in Gray v. Swanney-McDonald, supra, refer to that case as controlling in the Ninth Circuit on the issue of being "in commerce" coverage of local service garages under the Fair Labor Standards Act. In essence they readopt it each time as the law on this subject. It is necessary, therefore to review it.

In that case, relied upon by the Court of Appeal in this case, the employees did not plead that they were engaged in commerce, did not present evidence or prove they were engaged in commerce, and the trial court did not find that they were engaged in commerce. However, the Court of Appeal held that the Employer by servicing vehicles on interstate highways had become a part of an Industry which cumulatively had an effect on commerce and thus the Act covered each and every member of the industry. No mention is made of employee's being so engaged.

That case involved a roadside service garage servicing the central downtown area of the City of Los Angeles, through which passed several internal roadways which were designated as interstate highways. The company did no out-of-state work.

There the court stated the rule which has become the rule in the Ninth Circuit, including this case:

> "The fact that such services are a small part of appellee's (the employer's) business renders them no less important to interstate commerce. Even if appellee's (the employer's) contribution to interstate commerce was, by itself, quite small, we cannot ignore the cumulative effect that the many small companies in appellee's (the employer's) position have upon commerce between the states. By regularly servicing vehicles on the Interstate and U.S. Highways, appellee (the employer) has become part of an industry the cumulative effect of which upon interstate commerce is substantial. Congress intended the Fair Labor Standards Act to cover such an industry, which necessarily means that the Act covers each and every member of that industry. The fact that any given, or every given, company's (employer's) contact with interstate are extremely small is irrelevant." (Emphasis added.)

Gray v. Swanney-McDonald, Inc. (1971) 436 F.2d 652, p. 653.

This is directly opposite to the direction and mandate of the Congress -- which makes the activities of the employee, not the employer, the test - which rejected and industry-wide coverage as to "in commerce" and which rejected activities which merely "affect" commerce.

It is also directly contrary to the decisions of this court construing the Fair Labor Standards Act as pointed out above, and contrary to the construction which this court has placed on a similar definition of commerce in the Clayton Act.

Yet this is the rule applicable in the Ninth Circuit, and it will remain so - even though contrary to the Act itself and contrary to the decisions of the Supreme Court - until and unless this Court reviews it and corrects such interpretation. In essence, it matters not what the Supreme Court has said, the Ninth Circuit's contrary interpretation will be and is the law of the land as to petitioner and those under the Ninth Circuit's jurisdiction, until changed by this court!

Uniformity of interpretation and equal application of the provisions of such a Federal statute, throughout this land, should be put in effect. For this reason the court should grant the writ in this case and correct this grave injustice....of having the law different here from that elsewhere in the nation.

2. A WAGE PLAN WHICH PAYS THE EMPLOYEE ABOVE THE MINIMUM WAGE REGULAR RATE, TIME AND A HALF THAT RATE FOR OVERTIME, PLUS COMMISSIONS AND PREMIUM INCENTIVE PAY EARNED, IF THIS EXCEEDS THE TOTAL TIME AND TIME AND A HALF DUE, IS NOT VIOLATIVE OF THE OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT.

What the Labor Department complains about is the excess pay. As long as petitioner pays employees straight time and time and half - but nothing more - it is satisfied. However, if in addition to the guaranteed regular and overtime rate, because the employee hustles on the job and brings in more business during his working hours, resulting in commissions and premium sums for certain kinds of business, - which increases his pay, the Department of Labor says this is forbidden.

The Court of Appeal, which appears not to understand the facts of the pay plan, agrees. The confusing aspect of its decision is that the Circuit court undertook to compare the pay plan in the case of Walling v. Youngerman-Reynolds

Hardwood Co., 325 U.S. 419, 65 S.Ct. 1242 (1945) (which was merely a device concoted the day before trial which merely continued in effect an improper plan which did not in fact pay time and time and one half) with the guaranteed regular time, time and a half plus commissions, if earned, pay plan of petitioner. There is no comparability.

An illustration from the actual transcript should clearly demonstrate. Page 57 of the Clerk's Transcript as to employee Ron McIntosh (hourly rate $1.65 per hour, pay every two weeks):

Date	Hrs	Total pay	Straight pay	Overtime pay	Comm.
3/31/71	140	$438.41	$132.00	$148.80	$157.61
4/14/71	118	$304.28	$132.00	$ 94.24	$ 78.04
4/30/71	140	$308.41	$132.00	$148.80	$ 27.61
5/13/71	110	$330.08	$132.00	$ 74.40	$123.68
5/31/71	140	$304.63	$132.00	$148.80	$ 23.83

As shown, the employee always got the guaranteed regular rate, time and a half that rate for hours over 40 in a week, plus commissions if earned. Thus, it is noted above that on May 13, 1971 for 110 hours of work he received more pay than he did for 140 hours of work on May 31 pay period - the difference being commissions earned.

Commissions are not something that an employee can earn at will. He never knows when he will get a police call which gives him a minimum of $5 even if it is a 15 minute call. Accidents, wrecks and auto roadside trouble are not things that one can predict. On such commercial business brought in by the employee he gets 43%, which can be substantial!

On one 8 hour shift on a rainy day an employee may service 5 police calls and tow three wrecks to a dealer for repair. Yet on the next day he may have none. Nevertheless, he still gets his time plus time and a half for overtime, even though no wrecks or police calls come his way.

This court stated in the case of 149 Madison Avenue Corp. v. Asselta, 331 U.S. 199, pp. 203, 204, 67 S.Ct. 1178, p. 1181 (1947):

> "It was not the purpose of Congress in enacting the Fair Labor Standards Act to impose upon the almost infinite variety of employment situations a single rigid form of wage agreement."

And in the case of Walling v. A. H. Belo Corporation, 316 U.S. 624, p. 632, 62 S.Ct. 1223, p. 1227 (1942), this court stated:

> "But the Act does not prohibit paying more; it requires only that the overtime rate be 'not less than' 150% of the basic rate. It is also

true that under this formula the overtime rate may vary from week to week. But nothing in the Act forbids such fluctuation."

The Court of Appeal has changed all of this. It would straight-jacket one into an unrealistic straight time and overtime pay forbidding commissions which produce higher pay to the employee and which is the common practice in this industry in order to attract and hold competent employees.

It is interesting to note that even though under the regulations (29 Code of Fed. Reg. 778, Section 778.102) it is pointed out that the Act does not require an employee be paid overtime compensation for hours in excess of 8 hours per day if no more than 40 hours are worked in the week, yet under the petitioner's plan, time and a half was paid for all hours above the regular shift even though not more than 40 hours were worked in a week.

The pay plan meets all of the criteria, terms and purpose of the Fair Labor Standards Act. An interpretation of the Act should not be made to hurt and cut the pay of employees - as is the result of this decision - but rather to foster the welfare and compensation of the employee.

An employer who pays more should not be punished. Common sense and normal business judgment should be applied in examining business pay plans.

It has been some approximate 25 to 30 years since this court has examined and laid down interpretative guide lines as to employment pay plans meeting and not meeting the requirements of the Fair Labor Standards Act. In that time, there have been many innovations and assistance is again needed from this court to clear the haze which has developed in this area.

CONCLUSION

For the reasons expressed herein and upon the grounds set forth it is respectfully urged that this court issue a writ of certiorari to review the judgment and decision of the Court of Appeal in this case and firmly establish one rule for "in commerce" throughout the land, (instead of one for the rest of the country and a separate one for the Ninth Circuit) and that it clarify that pay plans which pay regular time and overtime plus additional compensation, if earned, are not violative of the provisions of the Fair Labor Standards Act.

Respectfully submitted,

G. G. BAUMEN

Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellant,

vs.

ROSS BAKER doing business as ROSS BAKER TOWING,
Defendant-Appellee.

No. 74-1779
No. 74-1839

OPINION

[October 26, 1976]

Appeal from the United States District Court
for the Central District of California

Before: ELY, LAY* and ANDERSON,
Circuit Judges.

LAY, Circuit Judge:

The Secretary of Labor appeals from the dismissal on the merits of an action under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* The Secretary brought the action seeking to enjoin defendant Ross Baker, d/b/a Ross Baker Towing, from allegedly violating the Act's overtime and record keeping requirements, and to restrain him from withholding wages due under the Act to his employees.

After trial, the district court found that: (1) the defendant's employees were engaged in commerce within the meaning of the FLSA; (2) the defendant's business was not exempt from the provisions of the FLSA as a retail or service establishment; (3) the defendant's employee Danny Davis, during all times mentioned in plaintiff's complaint, was employed in a bona fide executive and administrative capacity, and as such was exempt

*The Honorable Donald P. Lay, United States Circuit Judge for the Eighth Circuit, sitting by designation.

from the overtime provisions of the FLSA by virtue of § 13(a)(1) thereof; and (4) the defendant violated neither the overtime provisions nor the record keeping provisions of the FLSA.

The Secretary appeals the court's ruling regarding the exemption for Danny Davis and defendant's compliance with the overtime provisions of the Act. The defendant has cross-appealed on the grounds that his employees are not covered by the Act and that, even if they are covered, his business, a tow truck operation, is exempt as a retail or service establishment.

The defendant operates a towing service in the San Fernando Valley, employing nine to twelve tow truck drivers who render roadside automotive repair services and tow disabled or abandoned vehicles on city streets, state highways and interstate freeways. In addition to services rendered to the general public and commercial accounts the defendant has a service agreement with the Auto Club of Southern California,[1] which accounts for approximately 30% of his business. The defendant has also been designated as the official police garage for the Devonshire Division by the Los Angeles Police Department and renders towing service in connection with this assignment.

The Overtime Provisions.

As a pretrial stipulation the parties recited:

> The following facts are admitted and require no proof:
>
> . . . .
>
> 12. During the period of this action, Defendant guaranteed each of his tow truck drivers $1.65 an hour for the first forty hours and $2.48 an hour for the hours over forty per workweek *or* a commission on the total business that each driver brought in during the week, *whichever was greater.* For example, drivers were paid 43 percent commissions for all commercial charges and flat sums of $5.00 per police department call and $1.40 per Auto Club call. These same rates and the 43 percent commission rate were

[1]The defendant bills the charges for these services to the Auto Club which pays him from funds obtained through membership fees. The club members do not pay the defendant directly unless the tow exceeds five miles. In that event members pay defendant directly for the fee in excess of five miles.

> paid regardless of whether the services were performed in the first forty hours or in the overtime hours. (Emphasis added).

The dispute between the parties centers around whether the effect of this stipulation regarding manner of payment violates the overtime provisions of the Act.[2]

Section 7(a)(1) of the Fair Labor Standards Act requires that an employee receive compensation for hours worked in excess of forty per week "at a rate not less than one and one-half times the *regular rate* at which he is employed." 29 U.S.C. § 207(a)(1) (emphasis added). The Supreme Court holds "the keystone of § 7(a)" to be the "regular rate of compensation." *Walling v. Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419, 424 (1945). In *Youngerman*, as in the instant case, the employee was guaranteed a basic hourly rate for regular hours and one and one-half times that amount for overtime, or, in the alternative, an "incentive" rate based on actual work completed. The Supreme Court found the incentive rate violative of the statutory mandate. The Court stated: "In the case of piece work wages, this regular rate coincides with the hourly rate *actually received* for all hours worked during the particular workweek, such rate being the quotient of the amount received during the week divided by the number of hours worked." *Id.* (emphasis added).

The defendant here argues that "[t]he list of employees showing total hours worked (on a two weeks' pay period) reflect . . . that every employee was paid time and one-half his regular rate (which in every instance was in excess of the minimum rate) for all hours worked in excess of 40 hours per week."

[2]Another stipulation is that a driver is guaranteed $115.60 for sixty hours worked unless his commissions are greater. This arrangement amounts to the same as $1.65 per hour for forty hours and time and one-half for the other twenty. It does not appear operative unless the amount of commissions is less than $115.60 for a sixty-hour work week. Furthermore it is not a guaranty of weekly pay. As the government points out, under defendant's plan, whether the employee is paid on the hours-worked basis or on the alternative commission basis, his pay depends on the fortuities of the week's business, and there is no guaranty whatever that the pay for the week will not go below any specified amount. Therefore neither *Walling v. A. H. Belo Corp.*, 316 U.S. 624 (1942), nor 29 U.S.C. § 207(f) is applicable here.

The rate schedule and Baker's argument that he has complied with the Act can be better understood by using the examples Baker sets forth.

Employee Terry A. Gilzer for the two week period ending August 31, 1971, worked a total of 136 hours, earning $387.04. The work records reveal that this sum is for $188.80 straight time and $198.24 overtime. It is contended that this reflects $2.36 per hour for two 40-hour weeks and $3.54 per hour for the 56 hours overtime. Similarly for the two week period ending June 14, 1972, he worked a total of 97 hours for which he was paid $358.70. The employer breaks this down into $3.40 per hour or $272 for regular time, and $5.10 per hour for 17 hours overtime totaling $86.70.

Employee Keith W. Smith worked a total of 104 hours for the period ending October 14, 1972. He received a total of $221.68 which the employer breaks down into 80 hours of straight time at $1.91 per hour and 24 hours of overtime at a rate of $2.87 per hour.

Employee William T. Gibb, for the work period ending August 31, 1971, received $179.20 straight time for two 40-hour weeks, reflecting a rate of $2.24 for the 80 hours and $194.88 for 58 hours overtime, an hourly rate of $3.36. His total compensation for the pay period was $374.08.

From these examples we note that the so-called "regular rate" is constantly varying. Using the example of the employee Gilzer for the weeks ending August 31, 1971, we can readily see that defendant's payment plan as set forth in the pre-trial stipulation, and as explained in the briefs, misconceives the purpose and spirit of the Act as it relates to the determination of the regular rate and its effect on overtime pay. The records indicate that Gilzer worked a total of 136 hours during that two-week period, earning a total of $387.04. As discussed, the defendant argues that this represents $188.80 straight time and $198.24 overtime. However, if the employees were paid as the stipulation suggests, for 136 hours Gilzer should have been paid either $270.88 ($1.65 (80) + $2.48 (56)), or on a commission basis, which ever was greater. Because Gilzer's wages exceeded the stipulated hourly rate total of $270.88, *under the stipulation* the $387.04 necessarily represents the alternative payment of "com-

missions" during the two-week period. Under the *Youngerman* formula, where an incentive plan replaces an hourly rate, the commissions become, in fact, the *regular rate* and the employee Gilzer should have earned $467.68 on August 31, 1971, based on the following formula: $387.04 ÷ 136 hours = $2.85 per hour; $2.85 (80) + (one and one-half times $2.85, or $4.28 (56) = $467.68. The defendants argue that the $188.80 straight time represents two weeks at 40 hours each at a "regular rate" of $2.36 per hour and 56 hours overtime at one and one-half times $2.36 per hour. However, this computation does not reflect the manner in which employees were paid according to the stipulation agreed upon by the parties. There is nothing in the stipulation or in the testimony of Ross Baker, the only witness, to indicate that employees were paid by a method other than $1.65 per hour salary rate or by commissions *if they were in excess of the hourly rate*. Under this circumstance, the sole inference to be drawn from defendant's records is that the suggested wage rates were computed by working backwards from the total salary paid, using the formula $80 + 56 \frac{(3x)}{(2)} = \$387.04$, to determine an hourly rate (x) consistent with the law and the facts. This is impermissible.

The defendant argues that the FLSA "was intended simply to guarantee a minimum wage for 40 hours and time and one-half after 40 hours" and "[w]here an employer goes beyond that, fully complies with the Act and then pays them in excess of that, obviously, he has more than complied with the Act." This not only misreads the required method of computing the *regular rate* under the Act, but misconceives the dual purpose of the Act as well.

It is important to distinguish the maximum hours provisions of 29 U.S.C. § 207 and the minimum wage provisions of 29 U.S.C. § 206. One effect of the Fair Labor Standards Act was "to raise substandard wages first by a minimum wage and then by increased pay for overtime work." *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 577 (1942). Another intended effect was "to require extra pay for overtime work by those covered by the Act even though their hourly wages exceeded the statutory minimum." *Id.* In the *Overnight Motor* case the

plaintiff was a rate clerk paid a uniform weekly salary for fluctuating hours. Nothing above the set weekly wage was ever paid because the workweeks, computed at the statutory minimum rates with time and one-half for overtime, would not require an addition to the weekly wage. The Court concluded that "the Act was designed to require payment for overtime at time and a half the regular pay, where that pay is above the minimum, as well as where the regular pay is at minimum." *Id.* at 578.

The defendant further argues that §§ 7(e)(5), (6) and (7) of the Act, 29 U.S.C. §§ 207(e)(5), (6) and (7), relieve him from including in the "regular rate" amounts men received for standby work after their regular shifts, and whenever they were successful in servicing a call which was not "gone-on-arrival," and paid in excess of one and one-half times the hourly rate. Sections 7(e)(6) and (7) were intended to eliminate from the computation of "regular rate" extra compensation for extra or unusual hours *provided* "such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days," 29 U.S.C. § 207(e)(6), or "during such workday or workweek." 29 U.S.C. § 207(e)(7). Although the record is not clear on this point, and the government has not addressed itself to this question, it would appear that the defendant here pays his employees the same commission rate for work done no matter when performed, if the commission rate is the operative payment alternative. If this is the case neither § 7(e)(6) or § 7(e)(7) aids the defendant.[3] However, in the recomputation, if the defendant can demonstrate to the satisfaction of the trial court that some of the monies received for standby work qualify under §§ 7(e)(6) and (7), the district court should eliminate these sums from the computation of the "regular rate" pursuant to the statute. The parties should address themselves to this issue on remand.

We find that the only conclusion to be derived from the evidence and stipulation of the parties is that the defendant used an alternative commission-based compensation plan which did not

[3]Section 7(e)(5) is not relevant here. There is no evidence that the defendant pays a "premium rate" for hours worked in excess of 8 per day or in excess of the maximum applicable workweek. The stipulation is simply that employees are paid $1.65 per hour and time and one-half overtime, or commission, whichever is greater.

properly take overtime hours into account, and thereby violated the Act. Consequently, on remand defendant's employees' actual "regular rate" of pay must be recalculated by dividing their weekly salaries by the number of hours worked, and their overtime reassessed at time and one-half their regular rate for the period embraced by the complaint.

The Exemption Issue.

The Secretary also has appealed the district court's ruling that Danny Davis was entitled to an exemption under 29 U.S.C. § 213(a)(1). This section exempts from the Fair Labor Standards Act "any employee employed in a bona fide executive, administrative, or professional capacity." The regulation 29 CFR § 541.1 sets out a number of criteria an employee must meet in order to be classified as an executive. Aside from specified duties, the rule states that an executive:

> is compensated for his services on a salary basis at a rate of not less than $125 per week . . . exclusive of board, lodging, or other facilities:
>
> *Provided,* That an employee who . . . is compensated on a salary basis at a rate of not less than $200 per week . . . and whose primary duty consists of the management of the enterprise . . . and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all of the requirements of this section.

The Secretary contends that Davis did not "regularly" receive as "all or part of his compensation" a "predetermined amount" in contravention of the "salary test" under 29 CFR § 541.118.[4]

Although Ross Baker did testified that Mr. Davis was paid $190 to $200 per week, the payroll records of the company do

[4] 29 CFR § 541.118 reads:

> (a) An employee will be considered to be paid "on a salary basis" . . . if . . . he regularly receives each pay period . . . a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. . . . [T]*he employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.* (Emphasis added).

not verify this. On several occasions he was paid fluctuating amounts which were much less than $200. As the government points out, the more hours Davis worked, the more he was paid. His earnings fluctuated from $120 for a 40-hour week to $508 for a 160-hour pay period. For 27 of the 49 semi-monthly pay periods during the two years in question he received less than $411.66, the semi-monthly equivalent of the claimed $190 per week salary.

Under the circumstances, we find that the employer has failed to carry his burden in proving that Davis was exempt under the Act. The district court's finding in this regard must be set aside.

On cross-appeal defendant contends that his employees were not engaged in "commerce" as that term is defined under 29 U.S.C. § 203(b) and therefore were not subject to the Act. He also asserts that his business meets the requirements of 29 U.S.C. § 213(a)(2) and that he is exempt as a retail or business establishment. These two issues were rejected in similar cases involving tow truck businesses in *Gray v. Swanney-McDonald, Inc.*, 436 F.2d 652 (9th Cir.), *cert. denied,* 402 U.S. 995 (1971), and more recently in *Brennan v. Keyser,* 507 F.2d 472 (9th Cir. 1974), *cert. denied,* 420 U.S. 1004 (1975). They are dispositive of the cross-appeal.

The cross-appeal is dismissed; the judgment of the district court finding Danny Davis exempt under the Act is reversed; the judgment of the district court finding the defendant in compliance with the overtime requirements of the Act is reversed and the cause is remanded for an award of unpaid overtime compensation on the basis of time and one-half a "regular rate" recalculated in a manner consistent with the Act and this opinion.

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FILED

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCIS E. DEAN, JR. CLERK
U. S. COURT OF APPEALS

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff-Appellant	)	No. 74-1799
	)	No. 74-1839
v.	)	
ROSS BAKER doing business as ROSS BAKER TOWING, Defendant-Appellee.	)	ORDER

Before: ELY, LAY* and ANDERSON, Circuit Judges.

The petition for rehearing is denied.

*The Honorable Donald P. Lay, United States Circuit Judge for the Eighth Circuit, sitting by designation.

FILED

OCT 29 1973

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff,	CIVIL NO. 72-2827-RJK
[illegible] Defendant.	

The Court finds: that defendant's employees were engaged in commerce within the meaning of the Fair Labor Standards Act; that defendant's business was not exempt from the provisions of the Act as a retail or service establishment; that no employee except Danny Davis was exempt from the overtime provisions of the Act; that Danny Davis is so exempt; that defendant has violated neither the overtime provision nor the record keeping provisions of the Act.

Counsel for defendant will prepare, serve and lodge, pursuant to Local Rule 7, appropriate Findings of Fact and Conclusions of Law, and Judgment.

The Clerk of the Court shall send, by United States mail, copies of this Memorandum to all counsel herein.

DATED: October 29, 1973

Robert J. Kelleher
United States District Judge

(SPACE BELOW FOR FILING STAMP ONLY)

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NOV 8 1973

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Attorney for Defendant Ross Baker, doing business as Ross Baker Towing

ENTERED

NOV 8 1973

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

[illegible] SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, vs. ROSS BAKER, doing busines as ROSS BAKER TOWING, Defendant.	CIVIL NO. 72-2[illegible]-RJK

This action came on for trial on October 23 and 24, 1973, before the Court, the Honorable Robert J. Kelleher, United States District Judge, presiding, the issues having been duly tried, the Court having rendered its decision, and having duly made its Findings of Fact and Conclusions of Law, and pursuant thereto,

IT IS ORDERED AND ADJUDGED that plaintiff take nothing, that the action be dismissed on the merits, and that the defendant recover of the plaintiff his costs of action.

Dated: [illegible] 8, 1973

UNITED STATES DISTRICT JUDGE

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